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Human Rights Committee

Communication No. 1950/2010

**Views adopted by the Committee at its 114th session
(29 June-24 July 2015)**

<i>Submitted by:</i>	Viktor Timoshenko (unrepresented)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	26 January 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 May 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	22 July 2015
<i>Subject matter:</i>	Arbitrary detention
<i>Procedural issues:</i>	Right to submission of individual communication by a third party on behalf of an alleged victim
<i>Substantive issue:</i>	Arbitrary detention
<i>Article of the Covenant:</i>	9
<i>Articles of the Optional Protocol:</i>	1, 2, 3



Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (114th session)

concerning

Communication No. 1950/2010*

Submitted by: Viktor Timoshenko (unrepresented)

Alleged victim: The author

State party: Belarus

Date of communications: 26 January 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2015,

Having concluded its consideration of communication No. 1950/2010, submitted to the Human Rights Committee by Viktor Timoshenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 (4) of the Optional Protocol

1. The author of the communication is Viktor Timoshenko, a Belarusian national born in 1965. He claims to be a victim of a violation by Belarus of his rights under article 9 (3) and (4) of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is unrepresented.

The facts as submitted by the author

2.1 On 27 November 2008, the author was arrested by officers of the State Security Committee and brought to the premises of the Prosecutor General's Office, where he was informed by a senior investigator for particularly serious cases of the Prosecutor General's Office that criminal proceedings under article 16, parts 4 and 6, and article 431, part 1, of

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. The text of an individual opinion of Committee member Fabián Omar Salvioli (concurring) is appended to the present Views.

the Criminal Code of Belarus (criminal complicity in giving a bribe) had been instituted against him. On the same day, the author's remand in custody was endorsed, in absentia, by the Deputy Prosecutor General as a measure of restraint.

2.2 On 5 December 2008, the author was informed that, on 4 December 2008, he had been charged under article 16, parts 4 and 6, and article 431, part 1, of the Criminal Code.

2.3 On 28 November 2008, 10 December 2008 and 15 January 2009, the author's counsel submitted complaints to the Prosecutor General about the unlawful actions of his subordinate officers in relation to the author's arbitrary arrest, detention and institution of criminal proceedings. In violation of the law, however, the complaints were forwarded to the officers in question, who dismissed them.¹

2.4 On 30 December 2008, the author's counsel complained to the Court of the Central District in Minsk, appealing the decision of the Deputy Prosecutor General of 27 November 2008 regarding the author's remand in custody. On 10 January 2009, the Court of the Central District in Minsk rejected the complaint on the grounds that, under article 126, part 1, of the Criminal Procedure Code, remand in custody is applied to a person suspected of having committed a crime punishable by more than two years of imprisonment. The Court found that the author had been taken into custody on 27 November 2008 as he was suspected of having committed a crime under article 16, parts 4 and 6, and article 431, part 1, of the Criminal Code. The Court concluded that the author's right to defence had not been violated, his remand in custody had been endorsed by authorized officers (a prosecutor) in conformity with the law in force and the decision of the Deputy Prosecutor General had provided reasons for the application of the chosen measure of restraint.

2.5 On 15 January 2009, the author's counsel appealed the above ruling to the Minsk City Court. He specifically argued that his client's rights under article 9 (1), (3) and (4) of the Covenant had been violated. Furthermore, counsel contended that his complaint of 30 December 2008, appealing the decision of the Deputy Prosecutor General of 27 November 2008 on the author's remand in custody, had been transmitted to the Court only on 9 January 2009, rather than within 72 hours, as envisaged under article 143, part 3, of the Criminal Procedure Code.

2.6 On 20 January 2009, the Minsk City Court dismissed the appeal of 15 January 2009 on the same grounds as those of the Court of the Central District in Minsk (see para. 2.4 above), without addressing counsel's claims under article 9 of the Covenant. The ruling reads, *inter alia*, that, under article 126, part 1, of the Belarus Criminal Procedure Code, remand in custody is applied to a person suspected of having committed a crime punishable by more than two years of imprisonment. On 4 December 2008, the author had been charged with having committed a crime under article 16, parts 4 and 6, and article 431, part 1, of the Criminal Code, punishable by up to five years in prison and, therefore, the charge "conformed to" the decision on the author's remand in custody. This ruling was final.

2.7 The author submits that he has exhausted all available domestic remedies.

The complaint

3.1 The author claims that the State party has violated his right under article 9 (3) of the Covenant, to be brought promptly before a judge or other officer authorized by law to exercise judicial power. Moreover, the author was not even brought before the Deputy Prosecutor General, who endorsed his remand in custody on 27 November 2008 in the absence of the author and his counsel.

¹ No supporting documents are provided in this regard by the author.

3.2 The author also claims a violation of his right under article 9 (4) of the Covenant, to bring proceedings before a court, in order for that court to decide without delay on the lawfulness of his detention. He argues that, while examining his complaint on 10 January 2009, the Central District Court of Minsk effectively did not decide on the lawfulness of his detention and failed to address counsel's arguments that, when endorsing the author's remand in custody, the Prosecutor General's Office had not provided any evidence in support of the assumption that, if released, the author would obstruct investigation or abscond. The author refers to article 117, part 1, of the Criminal Procedure Code, according to which a measure of restraint is to be applied when there is evidence allowing to conclude that a suspect or accused, if left at liberty, would obstruct investigation by, *inter alia*, exercising undue influence over participants of the criminal proceedings.

State party's preliminary observations

4.1 On 13 July 2010, the State party submitted, *inter alia*, that it "does not find legal grounds for further consideration of this communication". It added that it did not appear from the documentation on file that the Committee had received the communication from the individual, as "it seems obvious" that the communication was prepared by a third party (not the individual himself), contrary to article 1 of the Optional Protocol. It requested the Committee to clarify the relationship between the author of the present communication and the lawyer indicated by the author as a contact person eligible to obtain confidential information from the Committee on the complaint. The State party also requested the Committee to specify which articles of the Optional Protocol regulate the issue of submission by the Committee of confidential information directly to the individuals and to the third party.

4.2 By a note verbale dated 10 August 2010, the Committee informed the State party, *inter alia*, that its Special Rapporteur on new communications and interim measures sees no obstacles to the admissibility of the present communication under article 1 of the Optional Protocol, as it was duly signed by the author himself, and that there is nothing in the Optional Protocol or the Committee's rules of procedure or working methods to prevent the author from indicating an address other than his own for correspondence if he wished to do so. It invited the State party to submit its observations on the admissibility and merits of the communication within the established time limits.

4.3 By a note verbale dated 3 September 2010, the State party noted, *inter alia*, that it would suspend further consideration of the communication until the Committee provided a comprehensive response on all issues raised by the State party in its submission dated 13 July 2010. It further noted that it had assumed its obligations under article 1 of the Optional Protocol. The State party took note of the reply of the Special Rapporteur on new communications and interim measures on the absence of any obstacles to the admissibility of the communication under the Optional Protocol, but it considered the reply to be the Special Rapporteur's personal view, which did not and could not create any legal obligations for the States parties to the Covenant. The State party further noted that it had not raised any issues concerning the addresses for correspondence relating to the present communication; however, it had requested the Committee to clarify the relationship of the third party to the author and the grounds for the third party to be listed in the communication as contact person eligible to obtain confidential information from the Committee. Finally, the State party "draws the Committee's attention to the fact that, in accordance with article 1 of the Optional Protocol, the State party had recognized the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant, but not from other persons (third parties). The State party did not accept any other obligation under article 1 of the Optional Protocol and therefore it suspends further consideration of, *inter alia*, the present communication".

4.4 By a letter dated 28 October 2010, the Chair of the Committee informed the State party, *inter alia*, that the present communication had been duly signed by the author, who is himself the alleged victim. Regarding the author's decision to designate third party to receive correspondence from the Committee on his behalf, the Chair noted that nothing in the Optional Protocol prevents an author from indicating an address other than his own for correspondence or from designating third parties as recipients of the Committee's correspondence on his behalf. In this regard, the Chair highlighted that it had been the Committee's longstanding practice to allow authors to designate representatives of their choice, who may not necessarily live in the territory of the State party, not only to receive correspondence, but also to represent them before the Committee. Finally, the State party was again invited to submit its observations on admissibility and merits. On 20 December 2010, a first reminder for observations was sent to the State party.

4.5 By its note verbale dated 6 January 2011, the State party recalled that it had repeatedly expressed its legitimate concerns to the Committee regarding unjustified registration of individual communications. The majority of its concerns relate to the communications that were submitted by individuals who had deliberately not exhausted all available remedies in the State party, including filing an appeal with the Prosecutor's Office under the supervisory review procedure against judgements having acquired the force of *res judicata*.²

4.6 Furthermore, the State party noted that the registration before the Committee of communications submitted by a third party, such as a lawyer, on behalf of individuals alleging violations of their rights is undoubtedly abuse of the Committee's mandate and of the right to submit communications; registration of such communications is in violation of article 3 of the Optional Protocol. In addition, while being a State party to the Optional Protocol and having recognized the Committee's competence under article 1 thereof, the State party has not consented to the extension of the Committee's mandate. In this regard, the State party noted the Committee's "one-sided and broad interpretation ... of the legal norms of the respective international treaties" and explained that the interpretation of the provisions of the Covenant and the Optional Protocol shall be done strictly in accordance with articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties. It added that, according to the correct interpretation of article 1 and the preamble of the Optional Protocol, only communications submitted by individuals (and not by their representatives) may be registered by the Committee. Consequently, the State party concluded that it would decline every communication registered before the Committee in violation of the provisions of the aforementioned treaties and that any decision adopted by the Committee in relation to such communications would be considered by the State party as legally invalid.

4.7 On 25 January 2012, the State party reiterated the arguments expressed in its note verbale dated 6 January 2011 and submitted that any communications registered in violation of articles 2 and 5 of the Optional Protocol would be viewed by the State party as incompatible with the Protocol and would be rejected without comments on the admissibility or on the merits.

² The State party explains that the basis for this requirement is article 2 of the Optional Protocol. This observation by the State party is of a general nature and does not seem to relate directly to the current communication.

Issues and proceedings before the Committee

The lack of cooperation from the State party

5.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the author's communication, insofar as it is registered in violation of the provisions of the Optional Protocol; that it has no obligations regarding recognition of the Committee's rules of procedure nor the Committee's interpretation of the provisions of the Optional Protocol; and that decisions taken by the Committee on the present communication will be considered by its authorities as "invalid". The Committee also notes the State party's observation that registration of communications submitted by a third party (lawyers, other persons) on behalf of individuals claiming a violation of their rights constitutes an abuse of the mandate of the Committee and of the right to submit a communication.

5.2 The Committee recalls that under article 39 (2) of the Covenant, it is empowered to establish its own rules of procedure, which the States parties have agreed to recognize. It further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1 of the Optional Protocol). The Committee further notes that, by denying the right of an individual to be represented by a lawyer (or a designated person) of his or her choice before the Committee, the State party fails to meet its obligations under the Optional Protocol. Implicit in a State's adherence to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination, to forward its Views to the State party and the individual (art. 5, paras. 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views.³ It is up to the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication should be registered, and by declaring beforehand that it will not accept the Committee's determination on the admissibility and on the merits of the communication, the State party has violated its obligations under article 1 of the Optional Protocol.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in this

³ See communications No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1; Nos. 1867/2009, 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010, *Levinov v. Belarus*, Views adopted on 19 July 2012, para. 8.2; and No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 5.2.

connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee considers that the author has sufficiently substantiated his claim under article 9 (3) and (4) of the Covenant for the purposes of admissibility. In the absence of any observations by the State party in this connection, it declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

7.2 The Committee notes that, after the author's arrest on 27 November 2008, his remand in custody was endorsed by the Deputy Prosecutor General on the same day. The Committee recalls that, in its general comment No. 35, it stated that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with,⁴ and that a public prosecutor cannot be considered as an officer authorized to exercise judicial power within the meaning of article 9 (3).⁵ Accordingly, the Committee concludes that, in the circumstances of the present case, the author's right under article 9 (3) of the Covenant to be promptly brought before a judge after his arrest on criminal charges has been violated.

7.3 The Committee also notes that the author's appeal to the Court of the Central District in Minsk concerning the Deputy Prosecutor General's decision to place him in custody was submitted to the Office of the Prosecutor General on 30 December 2008. It further notes, as pointed out by the author, that, under the provisions of the domestic law,⁶ the Office of the Prosecutor General was obliged to transmit the author's appeal to court within 72 hours after reception. Nevertheless, the appeal in question was transmitted to the court only on 9 January 2009. The Committee refers to its general comment No. 35, according to which the right to bring proceedings before a court apply from the moment of arrest.⁷ The adjudication of the case should take place as expeditiously as possible.⁸ In the light of this, the Committee considers that in the circumstances of the present case, the delay of 10 days for the Office of the Prosecutor General to transmit the author's appeal to court constitutes a violation of the author's rights under article 9 (4) of the Covenant.

8. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 9 (3) and (4) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

⁴ See CCPR/C/GC/35, para. 32. See also communications No. 1178/2003, *Smantser v. Belarus*, Views adopted on 23 October 2008, para. 10.2; No. 1100/2002, *Bandajevsky v. Belarus*, Views adopted on 28 March 2006, paragraph 10.3; and No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3.

⁵ See CCPR/C/GC/35, para. 32. See also communication No. 1178/2003, *Smantser v. Belarus*, Views adopted on 23 October 2008, para. 10.2.

⁶ See Criminal Procedure Code of the Republic of Belarus, art. 143.

⁷ See CCPR/C/GC/35, para. 42.

⁸ *Ibid.*, para. 47.

10. By becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred. The Committee therefore requests the State party to provide, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

Appendix

[Original: Spanish]

Individual opinion of Committee member Fabián Omar Salvioli (concurring)

1. I fully share the reflections and conclusions the Committee has arrived at in the case of *Timoshenko v. Belarus* (communication No. 1950/2010).

2. In paragraph 6.3 of its decision, the Committee notes the author's claim that domestic remedies have been exhausted and the fact that the State party has not raised any objection to this claim.

3. I understand that article 5 (2) of the Optional Protocol should be read in the light of paragraph 1 of the same article. Thus, it is the written information made available by the parties (art. 5.1) that should guide the Committee's decision in regard to the two admissibility requirements, namely, that the same matter is not being examined under another procedure of international investigation or settlement (art. 5 (2) (a)) and that all available domestic remedies have been exhausted (art. 5 (2) (b)). Therefore, if the State party remains silent regarding these requirements, it tacitly waives the right to lodge the corresponding preliminary objections and the Committee must therefore give credence to the author's claims, declaring the communication admissible and proceeding to consider the case on its merits.

4. Otherwise, the Committee would have to carry out impossible research in order to ascertain that domestic remedies have indeed been exhausted (i.e., even in the absence of the State party's allegation, review the whole domestic legal system of each State concerned, all existing legal remedies and the way these are dealt with by the courts), or that the same matter is not being examined under another procedure of international investigation or settlement, which would require not only coordination with other international and regional bodies, but also an in-depth review of the cases submitted in order to establish with certainty that exactly the same type of matter is involved, a task which the Committee could not delegate to any other body.

